

The first requirement for a chemical test to be admissible is the establishment of probable cause to believe the employee used, had possession of, or was impaired by the drug at the time of the work-related accident. See K.S.A.1996 Supp. 44-501(d)(2)(A). The Administrative Law Judge denied respondent's request for an order compelling claimant to authorize additional conformity testing because the respondent had not presented evidence

at the preliminary hearing to establish probable cause. Respondent, however, argues probable cause was established based on proof of claimant's prior drug use and the fact claimant was injured when he fell walking over slick primer placed on the roof.

The Administrative Law Judge's finding of no probable cause relates directly to the admissibility of the drug test into evidence. Before the Appeals Board can consider the question regarding the admissibility of evidence, it must first consider whether it has jurisdiction to review this preliminary hearing finding. The workers compensation act requires a definite foundation be laid before the results of a chemical test are admissible into evidence. See K.S.A. 1996 Supp. 44-501(d)(2). In this case, the Administrative Law Judge found the respondent had not established probable cause to believe that the claimant used, had possession of, or was impaired by the drug at the time of the work-related accident. Accordingly, he denied respondent's request for an order compelling claimant to authorize additional drug testing.

The Appeals Board has limited authority and jurisdiction when reviewing findings from preliminary hearings. The disputed issue must be one of those specifically set forth in K.S.A. 1997 Supp. 44-534a or the Administrative Law Judge must have exceeded his jurisdiction as required by K.S.A. 1997 Supp. 44-551. The jurisdictional issues listed in K.S.A. 1997 Supp. 44-534a are: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; or (4) whether certain defenses apply.

Because the issue now before the Appeals Board is not one listed in the preliminary hearing statute, the question becomes whether the Administrative Law Judge has exceeded his jurisdiction.

The Appeals Board finds the Administrative Law Judge has the authority at a preliminary hearing to determine whether the respondent has met all the foundation requirements for a chemical test to be admitted into evidence. Therefore, the Appeals Board concludes it does not have jurisdiction to review the Administrative Law Judge's preliminary hearing finding regarding whether a party has proven the foundation requirements for the admission of a chemical test.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that respondent's application for review should be, and is hereby, dismissed, and the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated May 5, 1998, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

c: Russell C. Purvis, Kansas City, MO
D'Ambra M. Howard, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director